Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

DAVID LAI,

*Petitioner,*

v.

INTERNATIONAL IMMUNOLOGY CORP. (IIC),
RANDOLPH DICKINSON,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether this action as summarized, or boiled down, in the Second Amended Petition for Rehearing (En Banc) states a cause of action for relief, and thus relief should be granted, from the defendant's corruptly endeavored obstruction of justice under Color of State (Vexatious Litigant) Statute against the Fourteenth Amendment and the 42 U.S.C. Sec. 1983 in egregious deprivation of plaintiff's Constitutional Substantive (Life, Liberty and Property) and Procedural Due Process Rights and rights for full and fair trial of the 42 U.S.C. Sec. 1981 action against defendant's racial discrimination in making and enforcement of contract as supplémentally initiated in the (709533) second state court action. The second state court action was necessitated by the defendant's fraud upon the court in tortiously presenting the premeditated, fraudulently and actively concealed and concocted fraudulent EPE (the so-called David Lai's EMPLOYEE PERFORMANCE EVALUATION) as falsified Just Cause in conjunction with the railroaded, erroneous summary judgment in the (678191) first state court action (App. 27, 98-9539 in this Court) while the concocted fraudulent EPE is the core evidence of that racial discrimination, because the concocted fraudulent EPE has been the defendant's premeditated operative and cover-up device of the racial discrimination practice in making and enforcement of employment contract. For continuous oppression of the 42 U.S.C. Sec. 1981 action and the relevant evidence of fraud upon the court, defendants resort to deprive plaintiff Constitutional Rights under color of state law (App. 31 et seq., 98-9539 in this Court).

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 3

STATEMENT OF THE CASE ..... 3

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED ON BELOW ..... 7

THE RELEVANT PART OF THE AMENDED PETITION FOR REHEARING ..... 8

1. Essentially and fundamentally this is an action for relief from constitutional deprivation under color of state law ..... 8

2. Plaintiff's rights to sue for full and fair trial under the Thirteenth Amendment, the Civil Rights Act of 1866 and 42 U.S.C. Sec. 1981 ..... 10

3. The tortious deprivation was purposely committed by defendants under color of state law ..... 12

4. The state law was unconstitutional and was also applied unconstitutionally ..... 13

5. The state's participation and coordination in the deprivation ..... 15

6. This case epitomized the long and continuing national ill ..... 17

REASONS FOR GRANTING THE WRIT OF CERTIORARI ..... 17

TABLE OF CONTENTS – Continued

Page

1. Unconstitutional Deprivation ..... 17
2. Unconstitutional Process ..... 18
3. Unconstitutional Corrupt Endeavor..... 20
4. Unconstitutional Discrimination ..... 21
5. Unconstitutional Incrimination ..... 22

CONCLUSION ..... 23

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

*Adickes v. Kress & Co.*, 398 U.S. 144 (1969) ..... 21

*Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1950) ..... 23

*Armstrong v. Manzo*, 380 U.S. 545 (1965) ..... 18

*Arizona v. Fulminante*, 499 U.S. 279 (1991) ..... 18

*Boddie v. Connecticut*, 401 U.S. 371 (1971) ..... 18

*Burton v. Wilminton Pkg. Auth.*, 365 U.S. 715 (1960) .... 15

*Chapman v. California*, 386 U.S. 18 (1966) ..... 18

*Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1984) ..... 18

*Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1949) ..... 19

*Fuentes v. Shevin*, 407 U.S. 67 (1971) ..... 15

*Fusari v. Steinberg*, 419 U.S. 379 (1974) ..... 19

*Goldberg v. Kelly*, 397 U.S. 254 (1969) ..... 19

*Gomez v. Toledo*, 446 U.S. 636 (1979) ..... 17

*Grannis v. Ordean*, 234 U.S. 385 (1914) ..... 18

*Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1978) ..... 18

*Hewitt v. Helms*, 459 U.S. 460 (1982) ..... 19

*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1981) ..... 8

*Mathews v. Eldridge*, 424 U.S. 319 (1975) ..... 19

*Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1971) ..... 13

TABLE OF AUTHORITIES – Continued

Page

*Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950) ..... 18

*Parratt v. Taylor*, 451 U.S. 527 (1980) ..... 19

*Reitman v. Mulkey*, 387 U.S. 369 (1966) ..... 15

*Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) .... 12

*Rochin v. California*, 342 U.S. 165 (1951) ..... 23

*Runyon v. McCrary*, 427 U.S. 160 (1976) ..... 21

*St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) ..... 21

*Stanley v. Illinois*, 405 U.S. 645 (1971) ..... 23

*United States v. Atkinson*, 297 U.S. 157 (1936) ..... 23

*United States v. Young*, 470 U.S. 1 (1985) ..... 23

*U.S. Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711 (1982) ..... 21

*West v. Atkins*, 487 U.S. 42 (1987) ..... 13

STATE STATUTE

California Code of Civ. Proced. Sec. 391 ..... 13, 16, 19

CONSTITUTION

The Thirteenth Amendment ..... 3, 7, 16, 17

The Fourteenth Amendment ..... 3, 7, 17, 18, 19

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Civil Rights Act of 1866 ..... 2, 3, 7, 8, 10, 17

Civil Rights Act of 1871 ..... 7, 8, 17

Civil Rights Act of 1991 ..... 15

Federal Rule of Civ. Proced. Rule 12(b)(6) ..... 1

Federal Rule of Civ. Proced. Rule 60(b)(2), 60(b)(3) ..... 12, 14, 15

18 U.S.C. Sec. 1503 and 1505 ..... 3, 7

28 U.S.C. Sec. 1331 ..... 3

42 U.S.C. Sec. 1981 ..... *passim*

42 U.S.C. Sec. 1983 ..... *passim*

## PETITION FOR WRIT OF CERTIORARI

This petition for a writ of certiorari seeks this Court's review of the judgment of the United States Court of Appeals for the Ninth Circuit on appeal of an independent action for relief from defendant's deprivation, under color of state law against 42 U.S.C. Sec. 1983, of plaintiff's Constitutional Due Process Rights and Rights for the 42 U.S.C. Sec. 1981 Action against defendant's Racial Discriminatory Practice in Making and Enforcement of Contract. Albeit the fact of the deprivation under color of state law against 42 U.S.C. Sec. 1983 had initially been labeled by plaintiff as Malicious Persecution to shield Fraud Upon the Court, or Corruptly Endeavored Obstruction of Justice.

## OPINIONS BELOW

The opinions are annexed in the Appendix: (a1 to a28) affirmed that of the District Court's dismissing the action on ground of defendant's motion under FRCP 12(b)(6).

## JURISDICTION

1. This action, arising from the (709533) second state court action, is for relief from Constitutional Deprivation under color of state law (App. 31, 98-9539 in this Court) against the Fourteenth Amendment and the 42 U.S.C. Sec. 1983. This federal action was necessitated by the

defendant's success in state court resorting to the corruptly endeavored obstruction of justice in attempting to continually conceal the defendant's Fraud Upon the Court and the relevant premeditated Discrimination Practice Based on Race in Making and Enforcement of Employment Contract, prohibited by Civil Rights Act of 1866 and 42 U.S.C. Sec. 1981. The material points of fact reside in the premeditated, fraudulently and actively concealed and concocted Fraudulent EPE, the so-called David Lai's EMPLOYEE PERFORMANCE EVALUATION, which has been the defendant's premeditated operative and cover-up device of the Premeditated Racial Discrimination Practice. The Concocted Fraudulent EPE appeared just in time to play Fraud Upon the Court in conjunction with the procurement of the railroaded, erroneous summary judgment on 6/16/95 (App. 27, 98-9539 in this Court) in the first state court action. The second action was filed, while the first was still on appeal, but was met with the defendant's corruptly endeavored obstruction of justice for the deprivation under the color of state law prohibited by 42 U.S.C. Sec. 1983. The relevant causes of action, e.g., Fraudulent and Active Concealment in Aggravation of Injury, Malicious Libel, and other provable disputes that should defy summary judgment actually existed, inter alia, in the prior 5/25/95 D022886 Appellant's Opening Brief, that of D024975, and the (961646) first federal court action which was dismissed on Res Judicata and Comity reasons in addition to defendant's false statement about the Concocted Fraudulent EPE, which could be proved, inter alia, by Primary Evidence of Fraud with fingerprinting examination.

2. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1331.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involved the Fourteenth Amendment and 42 U.S.C. § 1983 against the Constitutional Deprivation under color of state law; the Thirteenth Amendment against Involuntary Servitude; the Civil Rights Act of 1866 and 42 U.S.C. § 1981 against Racial Discrimination in Making and Enforcing Contract; the Fraud Upon the Court and the Corruptly Endeavored Obstruction of Justice in violation of 18 U.S.C. Secs. 1503 and 1505.

## STATEMENT OF THE CASE

This case involved Elaborately Premeditated Discriminatory Practice Based on Race in Making and Enforcement of Employment Contract against plaintiff. The schemes involved luring plaintiff, an experienced Ph.D. Chemist, nonwhite naturalized citizen, age 50s at that time, with false presentations and promises and then turning the premeditated tortious foul play on plaintiff. The false presentations and promises, inter alia, were benefits fully up to industry standard, fair and well treatment as "just cause only employee" after three months probation and to do Research and Development for patentable process and application as Research Scientist with the assignment of AAT project and mutual signing of Confidentiality Agreement requiring plaintiff's prompt

progress reports. That led plaintiff to give frequent progress reports and to devote year-long daily 10 to 14 hours performance recorded daily in several volumes of IIC's R & D Notebooks with the development of the patentable AAT process and the production of AAT that Dickinson said would last for 3 to 5 years.

Plaintiff had fulfilled the contractual agreement and performance while defendants carried out the Premeditated Foul Play of Racial Discriminatory Practice. The premeditated tortious foul play had two parts: Overt and Covert. All were so subtle, designed, absurd, unconscionable and outrageous that plaintiff could not understand what happened until through it all. The perpetrators participated in Overt Racial Discriminatory Practice which consisted of the deliberate assignment of projects to perpetrators who had no ability, desire or intent to do or learn to do their assignments but were allowed and encouraged, with deliberate withholding of needed mutual working interaction, to use Intentional Infliction of Emotional Distress with Interference, Harassment and Violence as a way of making unfathomable demands on plaintiff.

All kinds of help offered did not matter; the ultimate demands were to be as Involuntary Servitude to beg, volunteer, to show Servitude Attitude, to do the perpetrators' entire jobs, or to suffer the consequences including interference with plaintiff's job search elsewhere. The Covert Racial Discriminatory Practice consisted of obtaining plaintiff's signature by Dickinson with stealth and opportunistic traumatization on a piece of paper with intent to concoct the totally absurd Concocted Fraudulent EPE, which had been fraudulently and actively concealed

since before its inception and throughout the relevant time. The Concocted Fraudulent EPE has no foundation of reality and has been the defendant's Premeditated Operative and Cover-up Device of the Racial Discriminatory Practice in Making and Enforcement of Employment Contract. The Premeditated Concocted Fraudulent EPE has been created by defendants with evil intent, inter alia, to justify the practice of luring plaintiff as Research Scientist and turning into Involuntary Servitude; to justify the tortious alteration and falsification of contractual facts, agreement and performance; to justify the premeditated denial of meritorious promotion; to justify the premeditated taking away of all the plaintiff's performance and falsely attributing to the perpetrators who did no performance; to justify the nonwhite performer was fired while the white nonperformers were retained; to justify the shocking six-person SHOW-OF-FORCE yelling "Can't Win" around plaintiff before delivering retaliatory termination notice at the plaintiff's last minute at IIC and the interferences followed to prevent plaintiff from employment elsewhere; and to hide the facts that most contractual agreement and promises were not honored by defendants, including the printed express promises of "to be objective and fair" on the face of the Concocted Fraudulent EPE, since there were No Due Evaluation, No Due Review, No Due Disclosure, and No Due Disposition based on Real Contractual Agreement and Performance.

Many facts and proofs of the Premeditated Racial Discrimination shown in the absolutely absurd Concocted Fraudulent EPE actually have been pointed out in D024975 Appellant's Opening Brief but were totally

ignored by the state court of appeal with twisting prejudicial misapprehension relating to the Fraudulent EPE (App. 1 and Supplemental Brief of 98-9539 in this Court). The Research and Development required daily performance entries by plaintiff as Research Scientist, just like what is done by a Judge in court with traceable written records. Plaintiff has several volumes of recorded IIC's R & D Notebooks in IIC's possession. Almost all the R & D accomplishment during the relevant time was done by plaintiff. Against that recorded Contractual Agreement and Performance, the absurdity of the Concocted Fraudulent EPE could be seen by any reasonable person with common sense, not to mention the totally absurd dichotomy of the page that Dickinson traumatized plaintiff to sign and the rest of pages that Dickinson concealed. The relevant comparisons, inter alia, between plaintiff and the perpetrators will quickly reveal the defendant's Premeditated Racial Discrimination in Making and Enforcement of Contract.

Any reasonable person with common sense can immediately see that without Foul Play (Traumatization, Concealment and Concoction with Premeditated Evil Intent) plaintiff's signature would not be there. The Racial Discrimination will be proved by the recorded IIC's R & D Notebooks and others, the Primary Evidence of Fraud with fingerprint examination that defendants were requested by plaintiff to produce, the Evidence of Fraudulent and Active Concealment throughout the relevant time, and the Misconduct of Randolph Dickinson such as his fraudulent and active concealment of the Concocted Fraudulent EPE even after plaintiff's 7/26/92 Letter to the CEO Targaki and Dickinson's Evasion to

Interrogatory as shown in the USCA Excerpt of Record. There was a prior Interrogatory that defendants unlawfully refused to answer but was erroneously permitted to defy the law by the state court in denying the plaintiff's motion to compel. The fair and just resolution of this case, protected by 42 U.S.C. Sec. 1981, is hanging on the fair and just resolution of this action for relief under 42 U.S.C. Sec. 1983.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED ON BELOW

The involved facts of the Constitutional Deprivation under Color of State Law, against 42 U.S.C. Sec. 1983, have been initially labeled as Corruptly Endeavored Obstruction of Justice, or Malicious Persecution to oppress claims and evidences of Fraud Upon the Court with the Concocted Fraudulent EPE, in violation of 18 U.S.C. Secs. 1503 and 1505. The involvement of this case with the violation of the Thirteenth Amendment, Civil Rights Act of 1866 and 42 U.S.C. Sec. 1981 has passed on the courts since the first state action. The violation of the Fourteenth amendment was passed on in the Appellant's Opening Brief. The violation of the Fourteenth Amendment, Civil Rights Act of 1871 and 42 U.S.C. Sec. 1983 under color of state law with citation of many relevant cases were passed on in the 2/3/2000 filed Motion for Leave to File (Second) Amended Petition for Rehearing (En Banc) with Additional Citation of Supplemental Authorities, as well as the 2/8/2000 submitted (Second Amended) Petition for Rehearing (En Banc), the relevant part shown infra, which was denied (Cf. a1).

## THE RELEVANT PART OF THE AMENDED PETITION FOR REHEARING

1. ESSENTIALLY AND FUNDAMENTALLY THIS IS AN ACTION FOR RELIEF FROM CONSTITUTIONAL DEPRIVATION UNDER COLOR OF STATE LAW: With reorganization and clarification of the material alleged, this action is essentially and fundamentally an action seeking relief under the Fourteenth Amendment (footnote * infra), the Civil Rights Act of 1871 and the 42 U.S.C. Sec. 1983 (footnote ** infra) for the defendants' deprivation under color of state statute, of plaintiff's rights to sue for full and fair trial and to give evidence under the Thirteenth Amendment, the Civil Rights Act of 1866, and 42 U.S.C. Sec. 1981 (footnote *** infra), of plaintiff's Constitutional Rights for Equal Protection and Due Process, and of plaintiff's rights for Liberty and Property in terms of Legal Standing and Legal Claims, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1981). The defendants' violation of the 42 U.S.C. Sec. 1983 was previously labeled as Corruptly Endeavored Obstruction of Justice, and the defendants' violation of the 42 U.S.C. Sec. 1981, overtly in Unjust Extraction of Fruits of Labor and Imposition of Involuntary Servitude with Hostile Discriminatory Working Conditions deliberately created with Intentional Infliction of Emotional Distress and Fraud and Deceit, covertly in obtaining plaintiff's signature with Traumatization and concocting the False Performance Record (the Concocted Fraudulent EPE) as the premeditated operative and cover-up device of the Discriminatory Practice, and culminating in the defendant's Fraud Upon the Court by presenting the Concocted Fraudulent EPE in procuring the summary judgment, was

epitomized and simply labelled as the Fraud Upon the Court.

Reasons for the shorthand expression were Fraud Upon the Court was serious matter, the defendant's Fraud Upon the Court was where the plaintiff's first state action for 42 U.S.C. Sec. 1981 was closed, where there were the claims for the second state action to open the case, and more importantly the subject matter of the Fraud Upon the Court was the Concocted Fraudulent EPE (the so-called David Lai's EMPLOYEE PERFORMANCE EVALUATION) which embodied most of 42 U.S.C. Sec. 1981 claims in Discriminatory Practice Based on Race in Making and Enforcement of Employment Contract, among others, including not only without due evaluation of contractual performance, without due review, without due process and disclosure as expressly promised to be objective and fair, but also did the very opposite. Signature was obtained by traumatization, false performance record was concocted, fraudulently and actively concealed, and was premeditated and intended to be used as the operative cover-up device for the Discriminatory Practice Based on Race. There was no real contractual performance evaluation. What was therein were alterations of contractual facts, and trashing Personal Traits scores not only without foundation of reality and without relationship to contractual agreement or contractual performance, but also for justifying taking away the fruits of plaintiff's exceptional performance, as almost all the performance and achievement of the R & D Department at the relevant time were done by plaintiff as can be seen in several volumes of IIC's R & D Notebooks daily recorded, to falsely attribute to others who did

nothing, and thus to maintain and cover-up the Discriminatory Practice Based on Race.

2. PLAINTIFF'S RIGHTS TO SUE FOR FULL AND FAIR TRIAL UNDER THE THIRTEENTH AMENDMENT, THE CIVIL RIGHTS ACT OF 1866 AND 42 U.S.C. SEC. 1981: Defendants with intentional misrepresentations lured plaintiff, an experienced Ph.D. chemist, a nonwhite naturalized citizen, age 50s at that time, as Research Scientist for developing patentable processes and applications, requiring prompt progress reports with performance recorded daily in several volumes of IIC's R & D Notebooks. And almost all the R & D performance and achievement in that R & D Department at the relevant time were done by plaintiff. But the premeditated schemes carried out by defendants were to force plaintiff, in addition to doing his own assignment, to show "Servitude Attitude", to beg and to volunteer for Involuntary Servitude to do the jobs assigned to others who with no ability or desire to do or learn to do their assignments but were allowed to make unfathomable demands on plaintiff with Intentional Infliction of Emotional Distress (interference, intimidation, harassment and violence), aided by Dickinson's Intentional Fraud and Deceit in asserting no need of needed mutual interaction to create an unequal working condition in which the others acted like slavemasters with absolute right and no obligation while plaintiff had absolute obligation and no right.

The hostile, impossible working conditions built around plaintiff with incessant coercion for Extraction of Fruits of Labor and Imposition of Involuntary Servitude resulting in physical injury to plaintiff, in tricking for amiable separation with signing of never-existed-before

at-will handbook but 10 days later staging a six-person SHOW-OF-FORCE yelling "Can't Win" around plaintiff, followed by retaliatory termination notice.

Furthermore, during more than a year's separation and constant communication, the "Can't Win" retaliation clandestinely followed to prevent plaintiff from employment elsewhere. These facts prompted plaintiff's first state 678191 action, centered on Discriminatory Practice Based on Race, National Origin, Age (in Making and Enforcement of Employment Contract). But the action was hampered as described in the State's Participation and Coordination in the Deprivation, infra, especially when the Concocted Fraudulent EPE (the so-called David Lai's EMPLOYEE PERFORMANCE EVALUATION), which has been defendant's premeditated operative cover-up device for the Discriminatory Practice, and which had been fraudulently and actively concealed by defendants until its appearance just in time for the procurement of the summary judgment motion with its Fraud Upon the Court.

As amendment and reconsideration motions to address the Concocted Fraudulent EPE and its Fraud Upon the Court were unjustly denied, filing of new action with new primary rights on grounds of the defendant's Fraud and the court's Irregularities was the only option to attend full and fair trial. The second state 709533 action with various claims in Racial Discrimination in Making and Enforcement of Employment Contract centered on the Concocted Fraudulent EPE, including Planting False Performance Record, was timely filed while the 678191 was in appeal. The second state 709533 action was absolutly necessary for plaintiff in hope of full and fair trial,

and was the determined target for the defendants to obstruct justice, since defendants had just encountered in the first federal action (USDC 961646; USCA 97-55694) some relevant claims of Racial Discrimination in Making and Enforcement of Employment Contract in terms Racially-Motivated Racketeering Activity, Racketeering Influence Corrupt Organization (RICO), Fraudulent and Active Concealment in Aggravation of Injury and Malicious Libel, referring to the Extraction of Fruits of Labor, Imposition of Involuntary Servitude, Traumatization to obtain Signature for the Forgery of the Concocted Fraudulent EPE as the Discriminatory Practice's operative and cover-up device and for the Fraud Upon the Court and the permanent malicious publication in the state court of the Fraudulent Concoction. The first federal action was dismissed on Res Judicata and Comity reasons, in addition to the influence of the defendants' perjury with false statement therein. Without full and fair trial for the second state action (709533), plaintiff's rights to sue and give evidence under the 42 U.S.C. Sec. 1981 was deprived. The 709533 action was timely filed and was out of defendants' Fraud, which should be allowed at least under such as the Federal Rule of Civil Procedure, Rule 60(b)(3). *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

3. THE TORTIOUS DEPRIVATION WAS PURPOSELY COMMITTED BY DEFENDANTS UNDER COLOR OF STATE LAW: To deprive plaintiff's rights to sue for full and fair trial and to give evidence in Racial Discrimination in Making and Enforcement of Employment Contract protected by 42 U.S.C. Sec. 1981, regarding defendant's uses of Intentional Infliction of Emotional Distress and Fraud and Deceit to create Hostile Working

Condition for Unjust Extraction of Fruits of Labor, Imposition of Involuntary Servitude, and with Traumatization to obtain Signature for Forgery of False Performance Record to justify and coverup the Discriminatory practice Based on Race, etc., and to deprive plaintiff's Constitutional Rights for Equal Protection, Due Process, Liberty and Property, in terms of Legal Standing and Legal Claims, defendants through their attorneys corruptly endeavored to resist, scramble, delay the service of the 4/8/97 filed second 709533 state action and summons, unlawfully refuses to appear after receiving on 5/12/97 and took more than two months to prepare the Vexatious Litigant and General Demurrer dual motions filed on 7/18/97, the date of 678191 action final appeal returned, and unfairly calendared to be decided within 20 days on 8/8/97. The motion for Vexatious Litigant allegedly was based on California Code of Civ. Proced. Sec. 391(b)(3) *infra*. Defendants were indispensable actors in the proceeding in Hall of Justice, a state building, and the defendants hired BAKER & McKENZIE Attorneys at Law, who were court officers with full knowledge of impact and implication. The Tortious Deprivation with Preemptive Libelous Persecution was Purposely Committed by Defendant Under Color of State Law. *West v. Atkins*, 487 U.S. 42 (1987); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1971).

4. THE STATE LAW WAS UNCONSTITUTIONAL AND WAS ALSO APPLIED UNCONSTITUTIONALLY: The implied law was California Code of Civil Procedure, Sec. 391 (b). "Vexatious Litigant": (1). In the immediately . . . *in propria persona* . . . (2). After a litigation has been finally determined against the person, repeatedly

relitigates or attempts to relitigate, *in propria persona*, either (i), the validity of the determination . . . was finally determined or (ii), the cause of action, claim, controversy, or any of the issues of fact and law, determined or concluded by the final determination . . . was finally determined. (3). In any litigation while acting *in propria persona*, repeatedly files unmeritorious motions, . . . (Emphasis added). Clearly, it was against *in Propria Persona* as pointed out in the text with italics. It was Unconstitutional because it did not provide Constitutional Rights for Equal Protection. It was erected by monopolizing lawyers to look down, exclude and deny justice to ordinary citizens who have to attend the court to seek justice themselves. Also the law was unconstitutionally applied to exert Preemptive Deprivation, with False Incrimination, of plaintiff's legal standing and claims, which are important liberty and property, in violation of plaintiff's Constitutional Substantive and Procedural Due Process Rights. The unconstitutional application of the law to preemptively deprive plaintiff's claims under 42 U.S.C. Sec. 1981 was evidenced in the 8/8/97 Ruling (as shown in previous Attachment) with the Vexatious Litigant Order and the untruthful injection of Judicial Prejudice to plaintiff's 961646 Federal Action, prejudicially and summarily declared that the case was out of termination and thus totally ignoring the claims including Planting False Performance Record in the 709533 action. If the state court had any slight concern for victim of Discrimination Practice Based on Race, the court certainly knew that there were rules such as Fed.Rule. Civ.Proced. Rule 60. Relief From Judgment or Order, allowing post-judgment motion or action for new trial on

grounds of 60(b)(2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under Rule 59(b); or 60(b)(3) fraud, misrepresentation, or other misconduct of an adverse party, not to mention the 709533 action was filed while the 678191 action was in appeal. *Fuents v. Shevin*, 407 U.S. 67 (1971); *Reitman v. Mulkey*, 387 U.S. 369 (1966); *Burton v. Wilminton Pkg. Auth.*, 365 U.S. 715 (1960).

5. THE STATE'S PARTICIPATION AND COORDINATION IN THE DEPRIVATION: The bias of the Judge Charles R. Hayes presiding state court, in siding with the defendants' Baker & McKenzie Attorneys at Law, who have played Fraud Upon the Court and Corruptly Endeavored Obstruction of Justice in this case, in denying appellant's action, in pro se plaintiff, against the defendants' Discriminatory Practice Based on Race in Making and Enforcement of Employment Contract, not only quickly dismissed Randolph Dickinson as defendant but also culminated in declaring petitioner a Vexatious Litigant. The patterned and purposeful bias began with allowing defendants to demur, on ground of inability to exhaust administrative remedy, the main claim of Discriminatory Practice Based on Race, National Origin, Age (in Making and Enforcement of Employment Contract) in defiance of the intent of Civil Rights Act of 1991 for expanding, and not shrinking, protection from Discrimination in workplace. The claim clearly was a Sec. 1981 claim or a combination with Title VII claim and not a mere Title VII claim. Motion for reconsideration with correcting amendment was unfairly denied. With the Racial Discrimination claim unfairly denied, foregone with it were all the associated claims in defendant's

luring petitioner as Research Scientist and turning into Involuntary Servitude with Intentional Infliction of Emotional Distress and Fraud and Deceit to effectuate Racially-Motivated Discriminatory Practice, ironically, that included the preparation and the use of premeditated cover-up device, the Concocted Fraudulent EPE, which involved plaintiff's signature obtained under traumatization by Randolph Dickinson, fraudulently and actively concealed until appeared just in time to play Fraud Upon the Court to procure the summary judgment. All amendment and reconsideration motions were unjustly denied. Therefore, to address and overcome the defendant's Fraud and the Court's Irregularities, based on which to file new action was the only way. The 709533 action with new claims in Discriminatory Practice Based on Race in Making and Enforcement of Employment Contract including Planting False Performance Record was timely filed, though appellant spent some time with the relevant claims (USDC 961646; 97-55694) in the federal court. Appellant's rights to sue for full and fair trial under the Thirteenth Amendment, Civil Rights Act of 1866 and the 42 U.S.C. Sec. 1981 was unconstitutionally and violently deprived, not only with the state court's intention not to see the merits of the 709533 action, but also preposterously and prejudicially based on the passing proceeding in this case, to render the preemptive Vexatious Litigant Order. The participation and coordination was further shown in ruling not on the 391(b)(3) as defendants motioned but on 391(b)(2) with untruthful injection of prejudice, that the state court has had from the beginning, on the 961646 federal action (as shown in

the previous Attachment). *Gomez v. Toledo*, 446 U.S. 636 (1979).

6. THIS CASE EPITOMIZED THE LONG AND CONTINUING NATIONAL ILL: The long history and the intimate relationship, out of serious and continuing national crisis, between the Thirteenth Amendment with the Civil Rights Act of 1866 and the Fourteenth Amendment with the Civil Rights Act of 1871, is a testimony that this case involving the relevant 42 U.S.C. Secs. 1981 and 1983 should not be undermined. Especially, when appellant's Rights with Possessions and Property to be protected, to sue and to claim under Sec. 1981 not only was violently deprived but also the legal standing which affects life, liberty and property was violently and unjustly condemned as Vexatious Litigant and deprived the protection of Sec. 1983 under color of state law.

(Footnotes, Prayer, Date and Signature Omitted)

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### 1. UNCONSTITUTIONAL DEPRIVATION

The life, liberty and property are substantial interests of a citizen, protected by the United States Constitution, and should not be deprived without due process of law. As a plaintiff in litigation to seek relief from sufferings and damages sustained from Premeditated Racial Discrimination in Making and Enforcement of Employment Contract, petitioner has Liberty interest in the Legal Standing and Property interest in the Legal Claims. The

Liberty and Property interests, in terms of Legal Standing and Legal Claims, were unconstitutionally deprived without due process of law, albeit in the judicial system. The deprivation of plaintiff's liberty and property interests was arbitrary in constitutional sense. *Harrah Independent School Dist. v. Martin*, 440 U.S. 194, 198 (1978). The error was not harmless. *Chapman v. California*, 386 U.S. 18, 23 (1966). The error was prejudicial and affecting substantial rights. *Arizona v. Fulminante*, 499 U.S. 279, 319 (1991). The rights deprived were under the protection of the Fourteenth Amendment and 42 U.S.C. Sec. 1983.

## 2. UNCONSTITUTIONAL PROCESS

The Constitutional Due Process Clause provides that substantive rights cannot be deprived except pursuant to constitutionally adequate procedures . . . with appropriate procedural safeguards. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1984). An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate for hearing to the nature of the case. *Mullane v. Central Hanover Tr. Co.*, 339 U.S 306, 313 (1950). The root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those

who are to be heard to insure that they are given a meaningful opportunity to present their case. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1969). The application of due process standards in the examination of procedure due process, the doctrine of judicial self restraint requires the judge to exercise the utmost care whenever the judge was asked to deprive a party's constitutional rights. *Parratt v. Taylor*, 451 U.S. 527, 538 (1980). In this case, the California Code of Civil Procedure, Sec. 391 Vexatious Litigant statute was constitutionally and procedurally defective under the Fourteenth Amendment, *Hewitt v. Helms*, 459 U.S. 460, 472 (1982); *Mathews v. Eldridge*, 424 U.S. 319 (1975), with prejudicial discrimination apply only to litigants in propria persona. The vexatious litigant order was rendered as the defendants motioned without the consideration of the possible length of the wrongful deprivation and without assessing the impact on plaintiff's interests. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1974). Though the 709533 Complaint with causes of action in defendant's Racial Discrimination in Making and Enforcing Employment Contract and the Objection to defendant's vexatious litigant motion were presented before the state court as bases for predeprivation hearing, the state court simply ignored them with ingrained prejudice. Hence, there was neither a predeprivation hearing to check on the possibility that a wrongful deprivation would occur, nor postdeprivation remedies, as required in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1949), made available by the State to satisfy the Due Process (App. 31 et seq., 98-9539 in this Court).

## 3. UNCONSTITUTIONAL CORRUPT ENDEAVOR

The Concocted Fraudulent EPE, full of readily discernible absurdity and which had been fraudulently and actively concealed by defendants from before its inception, appeared just in time as an Exhibit, along with a receipt, that plaintiff was asked to sign on 11/20/92 just 10 days before the retaliatory termination on 11/30/92, of an at-will handbook that has never existed before, in conjunction with the defendant's summary judgment motion based on the alleged reason that plaintiff was an at-will employee at all times not available for relief from the Breach of Implied Covenant of Good Faith and Fair Dealing. To defend that plaintiff was not an at-will at all times, petitioner had to rely, inter alia, on the existence of the Fraudulent EPE but not on its Fraudulentness. The recognized Fraudulentness of the Fradulent EPE as causes of action, Fraudulent and Active Concealment in Aggravation of Injury and Malicious Libel, were added in the Proposed Amended Complaint in the D022886 Appellant's Opening Brief previously filed on 5/25/95, in the middle of the defendants' attorneys' unfair scrambling tactics as can be seen in the 6/16/95 ruling (App. 27, 98-9539 in this Court). All motions to present the Fradulentness of the Concocted Fraudulent EPE were unjustly denied, and those presented were later found to be prejudicially ignored (Supplemental Brief, 98-9539 in this Court). While the first state court action was pending on appeal, the (961646) first federal action with new primary rights based on the Concocted Fraudulent EPE was filed but was dismissed on Res Judicata and Comity reason in addition to the defendant's perjury with false statement about the Concocted Fraudulent EPE. That

necessitates the filing of the second state court action. To continually oppress any of the claims and evidences in the Concocted Fraudulent EPE, the Fraud Upon the Court, and the Premeditated Racial Discrimination in Making and Enforcement of Employment Contract, the defendants' attorneys corruptly endeavored the obstruction of justice by resisting services of the 4/8/97 filed Complaints and Summons, manipulating the servers, refusing to appear after receiving Complaints and Sermons on 5/12/97 and unlawfully took more than two months to prepare and file the vexatious litigant and general demurrer dual motions on 7/18/97, calendared to be decided within 20 days on 8/8/97 (App. 31, 98-9539 in this Court), resulting in the Unconstitutional Process and Deprivation, *supra*. Defendants clothed the state authority to deprive plaintiff's Legal Standing and Legal Claims in 42 U.S.C. Sec. 1981 action. The evidences of this case are tangible, very much greater and stronger than the case of *Adickes v. Kress & Co.*, 398 U.S. 144 (1969).

### 4. UNCONSTITUTIONAL DISCRIMINATION

This case came to court arising from Premeditated Discriminatory Practice Based on Race In Making and Enforcing Contract, *Runyon v. McCrary*, 427 U.S. 160 (1976), in the workplace. The Premeditated Racial Discrimination with the Concocted Fraudulent EPE in this case, even from the viewpoint of deprivation of equal contractual opportunity and promotion is much easier to discern than the cases of *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1982) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Defendants hired a team of four attorneys from Baker and McKenzie with unfair

scrambling tactics and playing Fraud Upon the Court with the Concocted Fraudulent EPE to procure the railroaded, erroneous summary judgment on 6/16/95 to prevent full and fair trial. Nevertheless, the causes of action related to the Concocted Fraudulent EPE were alleged, as soon as it appeared, in the prior 5/25/95 D022886 Appellant's Opening Brief, and that of D024975 (Supplemental Brief, 98-9539 in this Court). The second state action based on the Concocted Fraudulent EPE was filed while the appeal of the first was pending. To oppress the claims and evidences of the Concocted Fraudulent EPE, the related Fraud Upon the Court, and the Premeditated Racial Discrimination in Making and Enforcement of Employment Contract, defendants clothed the state authority to apply the state law with prejudicial discrimination against litigants in propria persona, like plaintiff, and no one else like defendants represented by attorneys from Baker and McKenzie. Hence the defendants also commit Racial Discrimination in the court, or cause the court to commit Racial Discrimination.

### 5. UNCONSTITUTIONAL INCRIMINATION

The worst kind of Racial Discrimination is for the court to provide safe haven for the evil perpetrators of Racial Discrimination, to harbor the tangible evidences of Racial Discrimination beyond the reach of justice, and to unconstitutionally incriminate the victim of the Racial Discrimination as Vexatious Litigant. The Unconstitutional Incrimination apparently had been done with some kind of statewide publication to attract inquiry from strangers. Petitioner's life, liberty and property have been

detrimentally if not fatally destroyed. Petitioner is longing that the principled case law still holding: The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1950) (Frankfurter, J., concurring). "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley v. Illinois*, 405 U.S. 645, 647 (1971). The error seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Young*, 470 U.S. 1, 15 (1985); *United States v. Atkinson*, 297 U.S 157 (1936). That must "shock the conscience" of federal judge. *Rochin v. California*, 342 U.S. 165, 172 (1952).

## CONCLUSION

This case presents a question of exceptional importance with grave consequences affecting the foundation of the Constitution and the Justice.

Accordingly, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: March 27, 2000

Respectfully submitted

David T. Lai, Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID LAI,

Plaintiff-Appellant,

v.

RANDOLPH DICKINSON; INTERNATIONAL IMMUNOLOGY CORPORATION,

Defendants-Appellees.

No. 98-56892

DC# CV-98-00191-IEG
Southern California
(San Diego)

ORDER

(Filed March 2, 2000)

Before: LEAVY, TROTT and SILVERMAN, Circuit Judges

Lai's motion for an extension of time, filed December 22, 1999, is granted. The clerk is directed to file Lai's original and amended petitions for rehearing en banc.

Judges Trott and Silverman have voted to deny Lai's petitions for rehearing en banc, and Judge Leavy has so recommended.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The original and amended petitions for rehearing en banc are denied.

The request to stay the mandate is also denied.

The panel denies Lai's motion to file a second amended petition for rehearing.

No further filings will be filed or entertained in this closed appeal.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

March 15, 1999

SHORT TITLE: Lai v. Dickinson, et al
DOCKET NO.(s): 98-56892

To All Counsel:

A suggestion for hearing en banc has been filed in the above appeal. You will be notified should the court order the cause heard en banc; otherwise, the appeal will be heard in due course by a regular panel of this court.

Very truly yours,

Cathy A. Catterson
Clerk of Court

/s/ Donna Gilmour
By: Donna Gilmour
Deputy Clerk

**David LAI**, Plaintiff-Appellant,

v.

**Randolph DICKINSON**; International Immunology Corporation, Defendants-Appellees.

No. 98-56892.

D.C. No. CV-98-00191-IEG.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 13, 1999.[1]

Decided Dec. 16, 1999.

Appeal from the United States District Court for the Southern District of California, Irma E. Gonzalez, District Judge, Presiding.

Before LEAVY, TROTT, and SILVERMAN, Circuit Judges.

MEMORANDUM[2]

David Lai appeals pro se the district court's order dismissing this action alleging numerous violations arising from Lai's discharge from employment by appellees. That discharge has been the subject of three previous actions brought by Lai against appellees, one in federal court. *See Lai v. Dickinson*, 141 F.3d 1177 (9th Cir.1998)

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[1] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2). Accordingly, Lai's request for oral argument is denied.

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

(unpublished disposition).[3] We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo both dismissals based on res judicata, *see Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir.1997), and dismissals under Fed.R.Civ.P. 12(b)(6), *see Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998). We may affirm on any ground supported by the record. *See id.* We affirm.

Res judicata "bars all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action." *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir.1987) (internal quotations omitted). Because Lai's claims in the present action and the previous three – including his claims of extrinsic fraud and fraud upon the court – arise from the same transactional nucleus of facts, rely on the same evidence, and involve the alleged infringement of the same right, the instant action is barred by res judicata. *See Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 868 (9th Cir.1995); *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir.1982).

Finally, because Lai did not and cannot allege all the elements required to state a claim for malicious prosecution based on the state court's issuance of a vexatious litigant order against him, the district court did not err by dismissing this cause of action. *See Sierra Club Found. v.*

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[3] The panel grants appellees' request to take judicial notice of the orders by the state courts and this court making final the judgments in Lai's previous three actions.

*Graham*, 85 Cal.Rptr.2d 726, 733 (Cal.Ct.App.1999) (recognizing that malicious prosecution action requires a prior action (1) terminated for plaintiff, (2) brought without probable cause, and (3) initiated with malice).

Lai's motion to file an amended reply brief is GRANTED. The panel has considered Lai's amended reply brief in lieu of the reply brief he filed originally and directs that the amended reply brief be filed.

AFFIRMED.

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| **DAVID LAI,**<br>**Plaintiff,**<br>**vs.**<br>**RANDOLPH DICKINSON and INTERNATIONAL IMMUNOLOGY CORPORATION,**<br>**Defendants.** | **CASE NO. 98-CV-0191-IEG (JFS)**<br>**ORDER DENYING DEFENDANTS' MOTION TO DISMISS AS MOOT [DOC. #4]**<br>**(Filed May 8, 1998)** |

On February 3, 1998, Plaintiff David Lai filed a verified complaint. On March 4, 1998, Defendants Randolph Dickinson and International Immunology Corporation filed a motion to dismiss plaintiff's complaint. On May 1, 1998, plaintiff filed a first amended complaint.

Because plaintiff filed his amended complaint after defendants filed their motion to dismiss, the Court hereby **DENIES AS MOOT** defendants' motion to dismiss.

**IT IS SO ORDERED.**

Date: 5/7/98 /s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States District Judge

cc: All Parties
Magistrate Judge James F. Stiven

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| **DAVID LAI,**<br>**Plaintiff,**<br>**vs.**<br>**RANDOLPH DICKINSON and INTERNATIONAL IMMUNOLOGY CORPORATION,**<br>**Defendants.** | **CASE NO. 98-CV-0191-IEG (JFS)**<br>**ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO PRODUCE PRIMARY EVIDENCE [DOC. #8]**<br>**(Filed May 8, 1998)** |

On February 3, 1998, Plaintiff David Lai filed a verified complaint. On March 4, 1998, Defendants Randolph Dickinson and International Immunology Corporation filed a motion to dismiss plaintiff's complaint. On March 16, 1998, plaintiff filed an objection to defendants' motion to dismiss. With his objection, plaintiff filed a motion to produce primary evidence.

The Court **DENIES WITHOUT PREJUDICE** plaintiff's motion to produce primary evidence. This matter should be scheduled before Magistrate Judge James F. Stiven.

**IT IS SO ORDERED.**

Date: 5/8/98 /s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States District Judge

cc: All Parties
Magistrate Judge James F. Stiven

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| David Lai,<br>Plaintiff,<br>vs.<br>Randolph Dickinson and International Immunology Corporation<br>Defendants. | CASE NO. 98-0191-IEG (JFS)<br>**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST-AMENDED COMPLAINT WITH PREJUDICE AND DENYING DEFENDANTS' MOTION FOR SANCTIONS**<br>[Doc. # 20, 28]<br>(Filed July 23, 1998) |

## BACKGROUND

Plaintiff filed the instant action in this Court on February 3, 1998 alleging thirteen claims arising out of his termination of employment by defendants International Immunology Corporation (IIC) and Randolph Dickinson ("Dickinson"). On May 1, 1998, plaintiff filed his first-amended complaint. Defendants filed a motion to dismiss plaintiff's first-amended complaint on May 21, 1998. Defendants also filed a motion for Rule 11 sanctions on April 7, 1998.

Plaintiff David Lai was employed by IIC from February, 1991 to January, 1993. During his employment, defendant Dickinson was his direct supervisor. Plaintiff was given notice of discharge on November 23, 1992, and

subsequently terminated from his employment in January, 1993.

On September 27, 1994, plaintiff filed an action in state court against defendants IIC and Dickinson ("1994 State Court Action"). On October 20, 1994, the 1994 State Court Action was partially dismissed with leave to amend. Plaintiff amended his complaint, and those claims were dismissed with prejudice on December 1, 1994. On June 16, 1995, defendants' motion for summary judgment was granted, thus terminating the remaining state court claims.

On September 20, 1996, plaintiff filed suit in federal court ("1996 Federal Court Action") against the same defendants as in the 1994 State Court Action. On January 27, 1997, Judge Judith N. Keep dismissed plaintiff's suit with prejudice on the basis of res judicata, holding that plaintiff alleged similar claims for wrongful termination that were previously litigated in state court.

Subsequently, on April 8, 1997, plaintiff filed suit in state court against the same defendants ("1997 State Court Action"). Defendants filed for demurrer and requested sanctions on July 18, 1997. On September 3, 1997, defendants filed a motion for an order declaring plaintiff a vexatious litigant. On October 17, 1997, the state court granted defendants' demurrer and judgment in their favor on the grounds that res judicata barred plaintiff's claims. The defendants were also awarded $9,701.71 in sanctions resulting from plaintiff's frivolous conduct.

## DISCUSSION

### A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)

A dismissal for failure to state a claim is proper in federal court "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" set forth in the pleadings. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). When a plaintiff appears *pro se* in a civil rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988). However, the Court does not have to accept as true conclusory allegations that contradict facts which may be judicially noticed by the Court or which are contradicted by documents referred to in the complaint. *See Mallis v. United States Bank Ct.*, 828 F.2d 1384, 1388 (9th Cir. 1987). Furthermore, to dismiss with prejudice, it must appear to a certainty that he plaintiff would not be entitled to relief under any set of facts that could be proven. *See Reddy v. Litton Indus.*, 912 F.2d 291, 293 (9th Cir. 1990).

### B. Plaintiff's Claims One through Eleven Are Barred by Res Judicata.

The doctrine of res judicata precludes a litigant from relitigating claims previously litigated if the earlier lawsuit: (a) involved the same claims as the present lawsuit; (b) reached a final judgment on the merits; and (c) involved the same parties or their privies. *See Blonder-Tongue Laboratories v. Univ. Of Ill. Found.*, 402 U.S. 313, 323-24 (1971); *Nordhorn v. Ladish Co. Inc.*, 9 F.3d 1402, 1404

(9th Cir. 1993). Res judicata has the effect of preventing relitigation of claims or defense that were or could have been raised in the previous litigation. *See Davis Cox v. Summa Corp.*, 751 F.2d 1507, 1518 (9th Cir. 1985). Moreover, a "state court judgment would have the same preclusive effect in federal court as the judgment would have in the courts of the rendering state." *See Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 328 (9th Cir. 1995).

**1. Plaintiff's Instant Federal Action Asserts the Same Claims as Previously Litigated and Determined in State and Federal Court**

In the instant case, petitioner seeks relief for thirteen claims: (1) breach of the implied covenant of good faith and fair dealing; (2) discriminatory practice based on race; (3) fraud and deceit; (4) interference of prospective business advantage; (5) premeditated wrongful inducement for "absolute servitude" or "de facto servitude; (6) breach of promises and agreement for unjust enrichment; (7) fraud and deceit to create and maintain hostile working environment and racketeering structure; (8) fraud, malice and oppression in a single act; (9) fraudulent concoction of false performance record; (10) fraudulent maneuvering for ultimate concealment and ultimate coercion; (11) malicious interference of making a living; (12) fraud upon the court; and (13) malicious persecution. In determining whether two lawsuits involve the same claims, courts should consider:

(1) whether the right or interests established in the prior judgment would be destroyed or

impaired by prosecution of the second action;

(2) whether substantially the same evidence is presented in the two actions;

(3) whether the two suits involve infringement of the same right; and

(4) whether the two suits arise out of the same transactional nucleus of facts.

*See Nordhorn,* 9 F.3d at 1405.

In the instant action, with respect to claims one through eleven, plaintiff alleges and relies upon facts that are identical to those alleged in his previous state and federal court actions. In the prior state and federal actions, plaintiff essentially alleged that he was wrongfully discharged without cause, with fraud, and for discriminatory reasons. He claims that defendants did not have cause to terminate him because his performance was recorded as exceptional in several volumes of IIC's Working Notebooks. He further alleged that defendants used fraudulent means to discharge him by fabricating and forcing him to sign a false employee performance evaluation ("EPE") which indicated that plaintiff's performance was inferior. Moreover, plaintiff asserted that his dismissal and the EPE were examples of the discriminatory practice defendants used against plaintiff because he was a non-white employee. Plaintiff raised these claims and allegations in the 1994 State Court Action, the 1996 Federal Court Action and the 1997 State Court Action.

Although claims one through eleven have been relabeled in the instant action, plaintiff reiterates the same claims and facts that he alleged in he previous

actions. In the instant action, plaintiff essentially asserts that defendants breached the implied covenant of good faith and fair dealing by wrongfully terminating him without cause, with fraud, and for discriminatory reasons. In addition, plaintiff alleges that defendants interfered with his prospective business advantage by terminating his employment. These same claims were previously raised and dismissed in the state and federal courts. Moreover, the facts supporting the instant allegations are the same as those used to support plaintiff's previous actions. For these reasons, the Court finds that plaintiff's instant action asserts the same claims as those previously litigated.

**2. Defendants have Obtained Final Judgments in Prior Litigation**

The preclusive effect of res judicata is triggered if the prior litigation terminated with a "final judgment on the merits." *See Nordhorn*, 9 F.3d at 1405. In the 1994 State Court Action, defendants' demurrers were sustained on plaintiff's fraud and discrimination claims, and summary judgment was granted on plaintiff's breach of contract claim. Thereafter, plaintiff filed his 1996 Federal Court Action which was dismissed on the grounds that the claims were barred by res judicata. Subsequently, defendants' demurrers were sustained on plaintiff's 1997 State Court Action because the claims were barred by res judicata. *See* 1997 State Court Action.

A judgment of dismissal after a demurrer is sustained constitutes a final judgment on the merits to the extent that the facts, do not state a cause of action. *See*

*Wells v. Marina City Properties, Inc.*, 29 Cal.3d 781, 789 (1981); *Keidatz v. Albany*, 39 Cal.2d 826, 828 (1952). Moreover, summary judgment is a "final judgment on the merits" for the purposes of applying the doctrine of res judicata. *See Fund for Animals, Inc. V. Lujan*, 962 F.2d 1391 (9th Cir. 1992). Accordingly, the Court finds that the prior state and federal court decisions constituted final judgments on the merits.

**3. The Suit Involves the Same Parties.**

Just as in plaintiff's previous state and federal actions, claims in the instant suit are brought against IIC and Dickinson. Because analogous claims against identical parties were already dismissed by final judgments in state and federal court, the Court finds that plaintiff's present action is barred by the doctrine of res judicata. Therefore, defendants' motion to dismiss claims one through eleven is **GRANTED WITH PREJUDICE.**

**C. Plaintiffs Claims Twelve and Thirteen Fail to State Claims under F.R.C.P. 12(b)(6).**

**1. Claim Twelve: Fraud Upon the Court**

In claim twelve, plaintiff contends that defendants committed "fraud upon the court" by relying on the EPE to justify plaintiff's discharge. Specifically, plaintiff contends that defendants coerced him into signing the EPE under duress, without allowing him to read its contents. Thus, plaintiff argues that the EPE, with plaintiff's signature, is fraudulent. Furthermore, plaintiff argues that

defendants' motion for an order declaring plaintiff a vexatious litigant is fraud upon the court.

A court will set aside a judgment under Federal Rule of Civil Procedure 60(b) when "fraud upon the court" exists. "Fraud upon the court" can be shown only when the moving party demonstrates that an unconscionable plan or scheme existed which was designed to improperly influence the court's decision. *See England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960). The burden is on the moving party to establish fraud by clear and convincing evidence. *See Atchison, Topeka & Santa Fe Ry. Co. v. Barren*, 246 F.2d 846 (9th Cir. 1957). Furthermore, the motion to set aside a judgment on this ground is addressed to the sound discretion of the trial court. *See Title v. United States*, 263 F.2d 28 (9th Cir. 1959).

Plaintiffs complaint against defendants is not the appropriate manner in which to raise a "fraud upon the court" claim. Based on Ninth Circuit law, it appears that plaintiff can only assert that "fraud upon the court" was committed in a motion to set aside a judgment under Federal Rule of Civil Procedure 60(b). *See England*, 281 F.2d at 309; *Atchison*, 246 F.2d 846; *Title*, 263 F.2d 28. Accordingly, defendants' motion to dismiss claim twelve is **GRANTED WITH PREJUDICE.**

**2. Claim Thirteen: Malicious Prosecution[1]**

In claim thirteen, plaintiff alleges that defendants' motion for an order declaring plaintiff a vexatious litigant in the 1997 State Court Action constitutes malicious prosecution. Plaintiff must allege the following elements to state a claim for relief under malicious prosecution:

(1) commencement or continuance of a criminal, civil or administrative proceeding;

(2) its legal causation or institution by the present defendant against the plaintiff, who was the defendant in the original proceeding;

(3) its bona fide termination in favor of the present plaintiff;

(4) the absence of probable cause for such a proceeding;

(5) malice; and

(6) damage to the plaintiff.

*See Engel v. CBS Inc.*, 981 F.2d 1076, 1079 (9th Cir. 1993) (citing 3 J.D. Lee & Barry A. Lindahl, *Modern Tort Law* § 40.04 (Rev. Ed. 1988); Restatement (2d), Torts, § 674).

In the instant case, plaintiff fails to state a claim for malicious prosecution. Although plaintiff may be able to satisfy elements one and six, he cannot allege facts to

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[1] Plaintiff raises this claim as "malicious persecution." Malicious persecution has no legal remedy. The Court therefore construes plaintiff's thirteenth claim as a claim for malicious prosecution.

support the remaining elements of the claim. For example, as to element two, plaintiff has never been a defendant in an action commenced by IIC or Dickinson. In addition, as to element three, plaintiff has never obtained a judgment in his favor from the previous state or federal litigations. It appears beyond a doubt that plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. For these reasons, the Court finds that plaintiff cannot state a claim for malicious prosecution. Accordingly, defendants' motion to dismiss is **GRANTED WITH PREJUDICE.**

**D. Motion for Sanctions**

Defendants move for the Court to impose sanctions against plaintiff for his repeated filings, in state and federal courts, of the same claims. Specifically, defendants move for an order to prohibit plaintiff from bringing further actions without the benefit of counsel or prior court order. Defendants assert that plaintiff has filed at least twenty non-meritorious motions, pleadings, and other papers, and that his frivolous claims have been dismissed by state and federal courts in separate actions over ten times. Defendants contend that they have suffered, and continue to suffer, significant monetary consequences as a result of plaintiff's vexatious litigiousness. Defendants cite to Rule 11 of the Federal Rule of Civil Procedure in support of their motion.

The Court declines to impose sanctions for procedural reasons. The most recent revision of Rule 11 operates under a safe harbor principle. Litigants must be given warning of the opposing party's intention to seek

sanctions so that the offending pleading can be withdrawn. If the pleading is withdrawn, then the litigant cannot be sanctioned. To facilitate the safe harbor approach, the opposing party is required to give notice of the intent to seek sanctions by serving the motion on the opposing party 21 days before the motion for sanctions is filed with the Court. Fed.R.Civ.P. 11 (c) (1)(A).

Defendants provide no proof that they served the notice of motion for sanctions on plaintiff 21 days prior to filing the request with this Court. In fact, Defendants' Proof of Service confirms that notice of the motion for sanctions was served on the same day that it was filed in Court. Therefore, the Court hereby **DENIES** defendants' motion for sanctions under Rule 11.

## CONCLUSION

For the reasons discussed above, the Court **GRANTS** defendants' motion to dismiss plaintiff's first-amended complaint. Because plaintiff cannot cure the deficiencies of his first-amended complaint, it is **DISMISSED WITH PREJUDICE.** In addition, the Court **DENIES** defendants' motion for sanctions.

**IT IS SO ORDERED.**

Dated: July 22, 1998

/s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States
District Judge

cc: Magistrate Judge James F. Stiven
All parties

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| DAVID LAI,<br><br>Plaintiff,<br><br>vs.<br><br>INTERNATIONAL IMMUNOLOGY CORPORATION and RANDOLPH DICKINSON,<br><br>Defendant. | CASE NO. 98CV0191<br><br>ORDER DENYING PLAINTIFF'S MOTION TO ALTER THE ORDER AND DENYING PLAINTIFF EQUITABLE RELIEF<br><br>(Filed Nov. 5, 1998) |

Plaintiff David Lai brings this action for judicial review of the Court's July 22, 1998 "Order Granting Defendants' Motion to Dismiss First-Amended Complaint with Prejudice" ("Order") and requesting the Court to grant plaintiff equitable relief. After reviewing the memoranda filed in support of and in opposition to plaintiff's motion, the Court finds this matter suitable for decision without oral argument pursuant to Local Civil Rule 7.1(d)(1).

## BACKGROUND

Defendant International Immunology Corporation ("IIC") employed plaintiff from February 1991 until January 1993 as a Research Scientist. During plaintiff's employment, defendant Randolph Dickinson ("Dickinson") was his direct supervisor. IIC gave plaintiff notice of discharge on November 23, 1992, and subsequently terminated his employment in January 1993.

On June 27, 1994, plaintiff filed a complaint in state court against IIC and Dickinson ("1994 State Court Action"), alleging a tortious breach of the covenant of good faith and fair dealing; discriminatory practice based on race, national origin, and age; intentional infliction of emotional distress; and fraud, deceit, and defamation. Defendants filed a demurrer to plaintiff's four causes of action. The court partially dismissed the action with leave to amend. Plaintiff amended his complaint, and those claims were dismissed with prejudice. Defendants then moved for summary judgment on the remaining causes of action. On June 16, 1995, the state court granted defendant's motion for summary judgment, thus terminating the remaining state court claims.

On September 20, 1996, plaintiff filed a complaint in federal court ("1996 Federal Court Action") against the same defendants. Judge Judith N. Keep dismissed plaintiff's suit with prejudice on the basis of *res judicata,* holding that plaintiff alleged the same claims for wrongful termination as in the 1994 State Court Action.

On April 8, 1997, plaintiff filed a complaint in state court against the same defendants ("1997 State Court Action"). Defendants filed a demurrer and requested sanctions, as well as a motion for an order declaring plaintiff a vexatious litigant. On October 17, 1997, the state court granted defendants' demurrer and issued a judgment in their favor on the grounds that *res judicata* barred plaintiff's claims. Defendants were awarded $9,701.71 in sanctions.

On February 3, 1998, plaintiff filed a complaint in this Court ("1998 Federal Court Action") alleging the following with regard to his termination of employment by

defendants: (1) breach of implied covenant of good faith and fair dealing, (2) discriminatory practice based on race, (3) fraud and deceit, and (4) interference with prospective business advantage. In a July 22, 1998 Order ("Order"), this Court found that plaintiff's first eleven claims were barred on the basis of *res judicata* and that his Twelfth and Thirteenth Claims failed to state claims upon which relief could granted. The Court dismissed all of plaintiff's claims with prejudice and denied defendants' motion for Rule 11 sanctions. (See Order Granting Defs.' Mot. to Dismiss & Den. Defs.' Mot. for Sanctions at 7) (declining to impose sanctions for procedural reasons).

On August 3, 1998, plaintiff filed his present motion for judicial review of the Order and for equitable relief. On September 18, 1998, defendants filed an opposition and requested that the Court, on its own motion, sanction plaintiff for his frivolous and harassing conduct. Plaintiff has filed no reply.

## DISCUSSION

Plaintiff moves to alter the Order on two grounds: (1) that defendants committed fraud upon the Court and (2) that Claims Eight through Eleven were not barred under *res judicata*. The Court construes plaintiff's motion as a motion for reconsideration under Federal Rule of Civil Procedure 60(b).[1]

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[1] Rule 60(b) gives the court the authority to reconsider a final judgment. Plaintiff has referred to Rule 60(b) in his motion and the Court construes this to be the legal basis for plaintiff bringing his motion. A liberal interpretation of the plaintiff's

**A. Applicable Law**

Under Rule 60(b), a district court may reconsider a final judgment, order, or proceeding if the moving party shows (1) mistake, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; or (6) "any other reason justifying relief from the operation of the judgment." The Ninth Circuit interprets the last exception to require a showing of "extraordinary circumstances." *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985); *McConnell v. MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir. 1985). A motion under Rule 60(b) must be made within a reasonable time, and for the first three reasons, not more than one year after the judgment was entered. Fed. R. Civ. P. 60(b). It is within the court's sound discretion whether to grant relief under Rule 60(b). *Thompson v. Housing Authority of Los Angeles*, 782 F.2d 829, 832 (9th Cir. 1986); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971); *Title v. United States*, 263 F.2d 28, 31 (9th Cir. 1959).

**B. Fraud upon the Court**

Plaintiff contends that defendants committed fraud upon the Court and that the judgment should accordingly be set aside. Plaintiff argues that defendants' motion to declare plaintiff a vexatious litigant in the 1997 State

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motion is appropriate, especially when the plaintiff is proceeding *pro se*. *Estelle v. Gamble*, 429 U.S. 97, 106-07 (1976); *Rice v. Hamilton Air Force Base Commissary*, 720 F.2d 1082, 1084 (9th Cir. 1983).

Court Action was an unconscionable scheme to influence the Court and that defendants fraudulently obtained his signature on an Employment Performance Evaluation ("EPE"). The Court construes plaintiff's claim of fraud upon the court as a motion under Rule 60(b)(3).

To obtain relief under this subsection, plaintiff must prove that there was fraud, misrepresentation, or misconduct on the part of defendants and that this fraud prevented plaintiff from fully and fairly presenting his case. *Abatti v. Commissioner*, 859 F.2d 115, 116-17 (9th Cir. 1988); *In re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987). A court will set aside a judgment under Rule 60(b) when "fraud upon the court" exists. "Fraud upon the court" can be shown only when the moving party demonstrates that an unconscionable plan or scheme existed which was designed to improperly influence the court's decision. *See England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960). The burden is on the moving party to establish fraud by clear and convincing evidence. *See Atchinson, Topeka & Santa Fe Ry. Co. v. Barrett*, 246 F.2d 846, 849-50 (9th Cir. 1957).

**1. Motion to Declare Plaintiff a Vexatious Litigant**

Plaintiff claims that defendants' motion for an order declaring plaintiff a vexatious litigant unduly influenced the court's decision to grant defendants' demurrer in the 1997 State Court Action. Plaintiff suggests that the timing of defendants' motion, specifically its close proximity to their demurrer, indicates an unconscionable plan or scheme. The Court is unconvinced as plaintiff produces no evidence that this timing has created prejudice.

The Court also finds that defendants' motion to declare plaintiff a vexatious litigant did not prevent plaintiff from fully or fairly presenting this case. Accordingly, plaintiff presents no clear and convincing evidence of an unconscionable plan or scheme perpetrated by defendants to commit fraud upon the court.

**2. Fraudulently Obtained Signature**

Plaintiff alleges that the EPE was fraudulently obtained and that, as a result of this document, he was unable to present his case fully. Plaintiff specifically claims that his signature on the EPE was not valid because he was not permitted to see the full evaluation.

Plaintiff fails to allege specific facts that prove how plaintiff's signature on the EPE was a fraud upon the court. The EPE was presented to the court on May 12, 1995. Since that time, plaintiff has had adequate opportunities to present evidence to support his claim that defendants have committed fraud upon the court through this EPE. Accordingly, plaintiff presents no clear and convincing evidence that defendants obtained his signature fraudulently nor that he has been prevented from fully and fairly presenting this evidence. *Atchinson,* 246 F.2d at 846.

**C. Claims Eight through Eleven are Barred by Res Judicata**

Plaintiff contends that claims eight through eleven of his First Amended Complaint have not been brought before the court and are not barred by *res judicata.* The

Court construes this request for alteration of the judgment as a claim under Rule 60(b)(6), as no other grounds exist under Rule 60. Rule 60(b)(6) requires a showing of "extraordinary circumstances" before reconsideration will be granted. *Backlund*, 778 F.2d at 1388; *McConnell*, 759 F.2d at 1407.

As discussed in the Order, these claims were previously brought against the same defendants in plaintiff's state court action. The state court action was terminated with a final judgment on the merits of the case. The Court was thus correct to reject them on *res judicata* grounds. *See Blonder-Tongue Laboratories v. University of Ill. Found.*, 402 U.S. 313, 323-24 (1971). Accordingly, no extraordinary circumstances exists which justifies relief from the operation of the judgment.

**D. Defendants' Request that the Court Sanction Plaintiff on its Own Motion**

In their opposition, defendants request that the Court sanction plaintiff on its own motion for his "frivolous and harassing conduct." (Def.'s Opp'n to Mot. to Alter Order at 4.) Federal Rule of Civil Procedure 11(b) requires that a party may not present a pleading, written motion, or other paper to the court for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation unless: (1) the claims, defenses and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; (2) the allegations have

evidentiary support; or (3) the denials of factual contentions are warranted on the evidence. Rule 11(c) allows the court to impose sanctions on its own if the court determines subdivision (b) has been violated. The court has considerable flexibility in determining how to impose these sanctions. *See, e.g., Student Loan Mktg. Ass'n v. Hanes,* No. 98-0734-B, 1998 WL 547007, at *8 (S.D. Cal. Aug. 24, 1998) (declining to impose sanctions but requiring the posting of a bond against future possible sanctions as a prerequisite to further filings).

Plaintiff's pleadings to date include frivolous legal arguments and his conclusory factual assertions are not supported by the record or any sworn statements. Although the Court declines to enter an order against plaintiff under Rule 11 at this time, it will instead require plaintiff to post a $5,000.00 cash bond with the Clerk of the Court before he is allowed to file further actions in this Court. This bond will be held by the Clerk and only be returned to plaintiff if the Court decides that his future filings do not merit Rule 11 sanctions. *See Washington v. Alaimo,* 934 F. Supp. 1395, 1398-1401 (S.D. Ga. 1996) (enjoining an individual from filing further lawsuits unless he first posted a bond).

## CONCLUSION

Based on the preceding discussion, the Courts hereby **DENIES** plaintiff's motion to alter the Order granting defendants' Motion to Dismiss Plaintiff's First-Amended Complaint and **DENIES** plaintiff's request for equitable relief. This Order terminates this case.

**IT IS SO ORDERED.**

Dated: 11/4/98 /s/ Irma E. Gonzalez
IRMA E. GONZALEZ
United States District Court

cc: **Magistrate Judge James F. Stiven**
all parties